People who don’t know anything about civil procedure or property law can still recall the basic elements of constitutional law from their eighth-grade civics class: separation of powers; checks and balances; judicial review; due process and equal protection of law; freedom of speech, religion, and press. And if they can’t remember what they learned in the eighth grade, the newspapers and the television news will remind them of the continuing significance of constitutional law. Is abortion constitutionally protected? How about affirmative action? Can the government hold an American citizen in a military prison as a suspected terrorist?

Everything the government does is bounded by the Constitution. Constitutional law defines the relations between the president and Congress and between the federal government and the states, and it regulates the government’s ability to assess taxes, to build highways, to maintain and deploy the armed forces, and to print stamps. Moreover, every hot issue seems to become a constitutional question. Once it was the constitutionality of slavery or of laws establishing maximum hours and minimum wages for workers; now it is abortion, the mandatory purchase of health insurance, detaining enemy combatants at Guantanamo Bay, and campaign financing. In the aftermath of the 2000 election, even who should be president became a constitutional issue, in the litigation resulting in the Supreme Court’s decision in Bush v. Gore. So constitutional law—how our government is organized and what it can and cannot do—is the place to begin our exploration of American law.

**What Is Constitutional Law?**

Constitutional law involves the interpretation and application of the U.S. Constitution. Drafted in 1787, the Constitution contains fewer
than 4,400 words, divided into seven short parts called articles. The Bill of Rights (the first ten amendments to the Constitution) was added in 1791, and only seventeen more amendments have been added in the more than two centuries since. It wouldn’t take you long to do what few Americans do—read the whole Constitution, front to back.

It seems that constitutional law ought to be easy to understand. But despite the Constitution’s simplicity—or perhaps because of it—what the Constitution means and how it should apply are the most hotly debated topics of the law. And constitutional law is unique among all the bodies of law we will consider in this book, for four reasons.

First, other bodies of law work together. Property law creates rights in things like land and refrigerators, and contract law prescribes how to transfer those rights to another person. Tort law defines the right of an injured person to recover damages from a wrongdoer, and civil procedure establishes the process by which the victim can recover. But constitutional law has a different subject matter and a different status than the other fields of law. Constitutional law doesn’t address relations among individuals the way property, contract, and tort law do. Instead, it defines the structure and function of the government and the relationships between the government and individual citizens. It also defines the relative powers of the national government and the state governments and prohibits the government from taking certain actions, such as those that infringe on freedom of religion. In defining and limiting government powers, constitutional law is superior to every other body of law. The Constitution proclaims itself to be “the supreme Law of the Land.” Any state or federal law on any topic—contracts, criminal punishment, election contributions, or public schools—that conflicts with the Constitution is invalid.

Second, other bodies of law are based on a mix of statutes and judicial decisions that provide a wide range of sources for rules, principles, and arguments. Contract law, for example, began as a common law subject determined by judges and has been overlaid by many statutes. To decide a contracts case, a court can look to a rich variety of sources, from old English precedents to modern state statutes. Constitutional law is different. All constitutional decisions ultimately refer to a single, narrow source: the text of the Constitution with its amendments.

The necessary reference to a single text makes constitutional law so challenging because of the infinitely broad range of situations that the text must cover. When the constitutional text addresses a narrow issue and does so specifically, we have little problem in figuring out how to apply the text; more often, the text is vague and the cases that it covers are much more diverse, so we have to decide what the text means and what result follows from it in a particular case. Sometimes, by universal agreement, the words mean something other than what they appear to mean. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” but even the most ardent strict constructionist understands that the amendment also applies to the president and the courts. Other times the words demand extensive interpretation. Does the constitutional command that no state may “deny to any person within its jurisdiction the equal protection of the laws” mean that a state university cannot give a preference in admissions to African American students in order to diversify its student body?

Third, constitutional law, more obviously than other areas of law, raises fundamental political issues and value choices. One of the themes of this book is that every body of law and every legal decision implicates important values; tort law, for example, forces us to make important choices about to what extent people must take account of the interests of other people. But in constitutional law, the value questions are more readily apparent and therefore are more controversial. If all law is political to some extent, constitutional law is more explicitly political than other bodies of law. There are very few simple or noncontroversial issues in interpreting and applying the Constitution.

Fourth, in other areas of law the processes of making and applying law seem obvious and appropriate. Legislatures and courts formulate principles of law, and courts apply those principles in deciding individual cases. In constitutional law the decision process also is clear, but whether it is appropriate is much more contested. In other areas of law the power of the courts is taken for granted, even if the correctness of the results they reach may not be. In constitutional law, by contrast, the central issues are why judges have the power to be the final arbiters of constitutional law and what theories of constitutional interpretation they should use in interpreting and applying the Constitution.

When the constitutional text requires interpreting, the courts do so, especially at the federal level. If necessary, cases are taken to the top, to be heard by the nine justices of the U.S. Supreme Court. But the Supreme Court justices are appointed, not elected, and once appointed they serve for life, without ever being subject to review again. If constitutional law involves fundamental political issues, why can those issues be decided for a democratic society by such an undemocratic institution? Moreover, the more overtly political institutions of government such as Congress resolve political issues by consulting constituents, being lobbied by interest groups, looking at opinion polls, and openly debating the pros and
cons. How does the Supreme Court decide hot political issues when it apparently is insulated from the political process?

These four distinctive features of constitutional law generate the subject matter discussed in this chapter. The most basic concerns the structure and authority of the federal government. The ratification of the Constitution created the national government and dictated its organization and powers. Constitutional law first specifies how the federal government is organized into three branches—executive, legislative, and judicial—and what each branch, and the federal government as a whole, can do. In concept, at least, the federal government is a government of both limited and supreme powers—limited to those powers granted it by the Constitution but supreme within its sphere. Accordingly, defining the powers of the national government also defines the principles of federalism, or the relationship between the national government and the states. (The powers of both national and state governments also are limited by the constitutional guarantees of individual liberty, especially in the Bill of Rights and the post–Civil War amendments, which are discussed in Chapter 3.) Running through all of these particular topics is the issue of constitutional interpretation. The federal courts, especially the Supreme Court, are the authoritative interpreters of the Constitution. How do they determine what the constitutional text means when applied in a particular case?

We usually think of the U.S. Constitution when we think of constitutional law, but each state has its own constitution and therefore its own body of constitutional law, too. The state constitutions are in many respects like the federal Constitution, as they establish the structure of the legislative, executive, and judicial branches and include bills of rights. But state constitutional law differs from federal law in important ways.

Most state constitutions are much longer and more detailed than the federal Constitution. The Alabama constitution, for example, is more than 600 pages long—about twice as long as this book. The New Jersey constitution of 1947, a modern, reform constitution, is still about three times the length of the U.S. Constitution.

Several factors contribute to the length of state constitutions. The national government is a government of enumerated powers, possessing only the authority granted to it under the Constitution, typically in vague language. The states, on the other hand, inherently have general authority to govern, so state constitutions limit rather than grant power, and the limitations often are stated very specifically. State constitutions also often contain provisions that are not particularly “constitutional,” in the sense of being directives about fundamental issues of rights or government organization. Some of these provisions address topics of particular concern to a state; Idaho has constitutional provisions on water rights and livestock, and New Mexico on bilingual education. Others are simply matters of detail that someone thought belonged in the constitution; the California constitution contains guidelines for the publication of court opinions. Finally, the national Constitution can be amended only through a cumbersome process and has been amended only seventeen times since the adoption of the Bill of Rights in 1791. State constitutional amendments generally can be proposed by the legislature, a constitutional commission, or citizens’ petition and can be adopted by referendum. As a result, state constitutions are often amended; the Massachusetts constitution, for example, has been amended over a hundred times. Indeed, state constitutions can and frequently are even replaced altogether; the current Georgia constitution is its tenth.

The bills of rights in state constitutions also are more detailed and are in some ways more important than the federal Bill of Rights. Instead of being added on to the main body of the constitution as in the federal Constitution, state bills of rights typically come first. This tradition dates from the earliest state constitutions that contained such well-known documents as the Virginia Declaration of Rights, a model for the Bill of Rights in the U.S. Constitution. These early documents included provisions guaranteeing the rights of the people and also oratory statements of government principle, such as the recommendation in the Pennsylvania Declaration of Rights that the legislature consist of “persons most noted for wisdom and virtue.” Today state bills of rights look more like the federal Bill of Rights but add to it in two important ways. They often contain protections that are similar to those in the federal Bill of Rights but are more detailed. The Louisiana constitution, for example, prohibits “cruel or unusual punishment,” a restriction analogous to the Eighth Amendment’s prohibition of “cruel and unusual punishment,” but it also bars “excessive” punishment, a requirement that the Louisiana Supreme Court has interpreted to mean that criminal penalties must be proportionate to the offense. And they express many rights not guaranteed by the federal Constitution; eleven constitutions expressly state a right of privacy, which the Supreme Court has found implicit in the Bill of Rights (as described in Chapter 3), and thirty-nine states guarantee access to a legal remedy for persons who suffer a legal injury.

The statement of rights in state constitutions that are broader than those granted under the U.S. Constitution has led to what Justice William Brennan labeled “the new judicial federalism.” For a long time lawyers and the public at large looked mostly to the federal courts for the protection of individual rights. Since the 1970s, however, there has been a surge of interest in attention to state constitutional law as an
independent source for the definition and potential expansion of rights. Since then state courts have been actively engaged in applying state constitutions to situations both like and unlike those addressed by the federal courts.

In a 1988 case, for example, the U.S. Supreme Court ruled that a person has no reasonable expectation of privacy in garbage bags left out for collection, so it did not constitute a violation of the Fourth Amendment when the police searched the garbage for evidence of a crime (California v. Greenwood). The same issue came to the New Jersey Supreme Court shortly thereafter in State v. Hemple (1990). The New Jersey constitution contained the same proscription against “unreasonable searches and seizures” as the Fourth Amendment, but the New Jersey court believed that a person does have a reasonable expectation of privacy in trash. “Clues to people’s most private traits and affairs can be found in their garbage,” wrote Justice Robert Clifford. “Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target’s financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests.” He recognized the Supreme Court’s contrary decision but in rather grandiose language pointed out the independent responsibility of state courts. “[A]lthough that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.” Two justices dissented in part because they believed “the values of federalism” required the court to defer to the Supreme Court’s decision. Diverging from the federal interpretation would be confusing to the public—local police could not search garbage but FBI agents could—and would undermine the moral authority of the Supreme Court as the “guardian of our liberties.”

Protection against unreasonable search and seizure is a right common to federal and state constitutions, though federal and state courts may interpret the right differently. State constitutions contain broader sources of rights than the federal Constitution, however. State courts have applied these rights to strike down damage caps in personal injury cases as a violation of the right of access to the courts, to require developing municipalities to provide low- and moderate-income housing, and to compel the state to provide special funding for poor urban school districts, among other things.

The most controversial cases of this kind address the question of whether there is a state constitutional right to same-sex marriage. In 1999 the Vermont Supreme Court held that under the Common Benefits Clause of the Vermont constitution, same-sex couples could not be denied the legal benefits of marriage (Baker v. State). The court directed the legislature to remedy the unconstitutionality, which it did by reaffirming marriage was between a man and a woman but creating civil unions with equivalent legal status. Then the Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health (2003) held that the ban on same-sex marriage violated the Due process and equal protection clauses of the state constitution. Marriage confers enormous legal benefits, from financial benefits such as joint income tax filing and inheritance rights to nonfinancial advantages including the presumption of parentage of children and the privilege not to testify against a spouse in court. It confers nonlegal benefits, too: “Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family....[T]he decision whether and whom to marry is among life’s momentous acts of self-definition.” Therefore, the state may not restrict marriage to heterosexual couples unless it has legitimate reasons to do so. The state argued that its reasons were providing a “favorable setting for procreation,” ensuring the optimal setting for child rearing in a two-parent family with one parent of each sex, and protecting financial resources because same-sex couples are more financially independent and so less in need of the financial benefits of marriage such as filing joint tax returns. The court rejected each of the state’s arguments and concluded that marriage thereafter would be the voluntary union of two persons as spouses, to the exclusion of all others,” without regard to the gender of the spouses; unlike in Vermont, the adoption of a civil union statute as an alternative to marriage would not satisfy the constitution.

The reaction to Goodridge was dramatic. In Massachusetts, more than a thousand gay and lesbian couples applied for marriage licenses on the first day they were available. At the national level, the movement to enact a federal Constitutional amendment defining marriage as between a man and a woman gained momentum, and the subject became a major issue in national campaigns. But, as in Vermont and Massachusetts, state constitutional law was a primary vehicle for the debate. The Connecticut, Iowa, and California supreme courts applied their state constitutions to invalidate limiting marriage to opposite-sex couples, and constitutional amendments banning same-sex marriage were adopted in many states.
Why Do We Need Constitutional Law?

This seems like an odd question. We have become so used to constitutional law that it is obvious why we need it: to organize the government and to protect civil liberties. And whether or not we need it, we have it; the Constitution is there, and it is the foundational document of our political system.

Nothing in the law is inevitable or necessary, though. Other nations manage to have a democratic political system and abundant civil liberties without our form of constitutionalism. Great Britain, for example, has neither a written constitution nor judicial review of legislation. When we think about whether we need constitutional law, the real question is what our brand of constitutional law does for us.

To accomplish together the things we cannot accomplish individually, we constitute or support a government to act on our behalf. Government facilitates collective action, enabling us to pool our resources to build schools, hire teachers, and make a system of public education available to everyone, for example. Government also provides security, protecting us from criminals, unscrupulous merchant, manufacturers of dangerous drugs, and foreign terrorists.

Government, to do all these things, must be strong. It needs the power to tax us to pay for the schools, to regulate drug companies, to fine crooked merchants, to put muggers in jail, and to maintain an army and navy. Such a powerful government presents a problem in itself. How do we make sure that the government won't tax us beyond our means, impose unreasonably burdensome regulations on small businesses, imprison the wrong people, or use the army to repress dissent?

One way we check the power of government is to make it a democratic government. The people control a democratic government, so the government cannot do something the people don't want or that infringes on their rights. But even if democracy is effective and the people have real control over the government (which some may question in modern America), there is a potential problem. An essential element of constitutional law is protecting the rights of minorities and individuals against attack by the majority. Constitutional law not only protects the integrity of the democratic process, but it protects minorities, protesters, dissenters, and eccentrics from the democratic process.

Constitutional law grapples with this conflict between empowering and limiting government. It deals with questions such as: How is the government organized? How much authority does it have? What processes does it have to follow in exercising that authority? What areas of people's lives are free from intrusion by the government?

Constitutional law is not alone in considering these issues, and it never resolves them finally, but it provides a process for struggling with them.

But how does it do this? It may be helpful to think of constitutional law as a process. Constitutional law provides a language and a forum for the debate of important issues. The language of constitutional law begins with the text of the Constitution and expands to the precedents that interpret it and the principles that can be drawn from it. Important social and political issues are habitually framed in this language: separation of powers, federalism, free speech, due process. Lawyers would like to think that this is a peculiarly legal language spoken only by professionals, but in fact constitutional debate is carried on not only by courts and lawyers but also by other government officials, interest groups, and the public at large.

Constitutional debate goes on in this language in many places, but our constitutional tradition has designated the courts—especially the U.S. Supreme Court—as the forum that can resolve the debate authoritatively. The Court is hardly nonpolitical, but it operates at a greater distance from immediate political influence than other branches of government because its judges have a limited function and they serve for life. The Court does not settle all matters for all time, but the arguments made before it and its decisions in constitutional cases play a significant role in structuring the analysis and resolution of major controversies.

Take as an example some highlights and lowlights of the Constitution's encounter with the race problem in America. In the heated controversy over slavery that led up to the Civil War, a slave named Dred Scott brought an action in federal court alleging that he had become free as a result of residing with his master in Illinois and the Wisconsin Territory prior to their return to the master's home in Missouri. Illinois was a free state, and slavery was prohibited in the Louisiana Territory north of latitude 36°30' by the Missouri Compromise of 1820; Scott argued that once he set foot in a state and territory where he was legally free, he could not be kept in slavery when he returned to Missouri, a slave state. Slavery was an issue of overwhelming importance for the nation with immense political, moral, and economic dimensions, but in Scott v. Sandford (as Dred Scott's case was styled in the Supreme Court, also commonly known as The Dred Scott Case), the issue was framed in constitutional terms.

In an 1857 opinion by Chief Justice Roger Taney, the Court held that blacks such as Scott were not "citizens" within the meaning of Articles III and IV of the Constitution, and he therefore could not bring
a lawsuit in federal court; even more remarkably, the court determined that the Missouri Compromise was unconstitutional. In Taney’s view, at the time of the framing of the Constitution blacks were “considered as a subordinate and inferior class of beings” not included within the Declaration of Independence’s claim that “all men are created equal” and thus not within the class of persons who, as citizens, could sue in federal court. And even though Congress had carefully crafted the Missouri Compromise as one in a series of political judgments that balanced the interests of North and South, it had exceeded its constitutional authority in doing so. Once the settlers of a territory organized their own government, Congress could no longer legislate for the territory.

The Dred Scott case illustrates the nature and limits of constitutional law. Slavery had been a highly charged issue since the founding of the nation, embodied in compromise provisions in the Constitution itself and the subject of debate in the Congress, the courts, and the country at large. As in Dred Scott, the debate dealt with substantive constitutional issues and was carried on in constitutional language as well as in moral, political, and economic terms. What was Congress’s authority to legislate concerning the slave or free status of territories and newly admitted states? How far could a state go in prohibiting slavery or in effectively preventing the travel of masters and slaves through its borders? Were blacks members of the constitutional community who could sue in federal court?

The debate in constitutional terms spilled outside the courtroom as well. Abraham Lincoln and Stephen Douglas clashed over Dred Scott and the nature of constitutional authority in their famous debates during the Senate campaign of 1858. Douglas affirmed the finality of the Court’s decision: “[W]hen the decision is made, my private opinion, your opinion, all other opinions must yield to the majesty of that authoritative adjudication.” Lincoln argued that the other branches of government could offer their own interpretation of the Constitution: “If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.”

This dispute went to a central element of American constitutionalism—whether the Supreme Court is the final authority on constitutional interpretation. A half-century before Dred Scott the Supreme Court had proclaimed itself the last word on constitutional interpretation, and the political system had acquiesced. However, the political reaction to Dred Scott demonstrated the limits of the Court’s role. Chief Justice Taney apparently hoped that the Dred Scott decision would resolve the national controversy over slavery once and for all. But what the political branches could not do in the Missouri Compromise and the Compromise of 1850 the judicial branch could not accomplish through its decision. Instead of bringing resolution, Dred Scott only inflamed the passions that shortly would lead to war.

Despite the failure of the Supreme Court to settle the slavery issue through constitutional adjudication, the race problem was still seen as a constitutional issue after the Civil War. New constitutional provisions—the Thirteenth, Fourteenth, and Fifteenth Amendments—were believed to be the vehicles for ending slavery, preventing racial discrimination, and ensuring political participation by blacks. The Fourteenth Amendment was especially important, drawing on concepts in the original Constitution and the Bill of Rights to guarantee newly freed slaves citizenship (overruling Dred Scott), the privileges and immunities of citizens, due process of law, and equal protection of the laws. These Reconstruction Amendments both empowered government to eradicate the vestiges of slavery and limited government’s ability to discriminate or interfere with the lives of its citizens.

The interpretation of these provisions over the succeeding century and a half has not been uniform either in principle or in result. In two famous cases, for example, the Court first allowed racial segregation of railroad cars (Plessy v. Ferguson, 1896) and subsequently prohibited racial segregation in schools (Brown v. Board of Education, 1954). Without rehearsing this long and complicated story, note that, as with Dred Scott, in court and in the public arena, the debate about race has been carried on with the aid of these constitutional principles. Defining “equal protection of the laws” under the Fourteenth Amendment—ascertaining what equality means and what government may or must do to create equality or to prevent or remedy inequality—has been a central inquiry in the debate about race. May the government favor minority contractors for highway projects? May a college give preference to black applicants to enhance the diversity of its student body?

For questions like these, the debate is partially carried on through constitutional discourse, and part of the answer comes through court decisions. The debate spills outside the courtroom, however, and outside the bounds of constitutional law, to be influenced by the legislatures, the electoral process, the media, and public sentiment.

Constitutional law, therefore, provides a vocabulary and a process for dealing with important issues. It is neither the only vocabulary nor the only process, but it has been an important and familiar one, if ever-changing, for more than two hundred years.
How Does the Supreme Court Decide What the Constitution Means?

In applying the Constitution, the Supreme Court defines and limits the powers of the government. But what limits the Court? Suppose the Court declared that from now on it would tell Congress how much to spend on building highways, or suppose it announced that every American was required to attend a Roman Catholic Church every Sunday? What prevents the Court from usurping the rightful powers of the other branches of government or of the states, or from trampling on the rights of the people through outrageous decisions?

As these absurd hypotheticals suggest, ultimately the Supreme Court is constrained by political realities. If the Court tried to direct Congress to spend money on highways or to force people to go to church, the resulting uproar would drown out the words of the Court's opinions. Because the Court cannot coerce compliance with its decisions, its constitutional authority is supported by our culture's tradition of respect for judicial authority and the rule of law. This respect is supported by the belief that in applying the Constitution, the justices of the Supreme Court are not simply expressing their own preferences about what the law ought to be. Rather, the Constitution itself directs their decision. Something in the text or the means of its interpretation controls or limits what the Court can do in a particular case. Just as the Constitution as interpreted by the Court regulates the authority of the rest of the government, the Constitution limits the authority of the Court itself.

The problem, though, is that the constitutional text is short and vague, yet the Court has to use it to decide a huge array of cases. Article I, section 8, clause 3, for example, empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." How does the Court know if this means Congress can require individuals to purchase health insurance? (The Court said Congress could not do so under the commerce clause but could establish a tax penalty for failing to buy insurance.) Or consider the abortion case Roe v. Wade. How did the Court conclude that the Constitution gives a woman an essentially unconstrained choice to have an abortion in the first trimester of her pregnancy but that it also allows the state to regulate or prohibit abortion as the pregnancy progresses? Or think about Brown v. Board of Education, the 1954 case that ordered the desegregation of public schools. Today virtually everyone agrees that the decision was correct and a landmark in the development of social justice in America. But how could the Court conclude that segregated schools were prohibited by the Fourteenth Amendment's equal protection clause when the Congress that passed the amendment also authorized segregated public schools in the District of Columbia?

The Constitution nowhere mentions health insurance, abortion, segregation, or schools. Yet the Court has to decide cases dealing with these and thousands of other subjects. A theory of constitutional interpretation is crucial to constitutional law, but the Constitution does not provide a guide to its own interpretation. Accordingly, constructing such a theory has been a major concern of judges and scholars.

It would be easy to interpret the Constitution if its meaning were clear from the text itself. Unfortunately, that's not the case. Most constitutional provisions are vague, like the commerce clause. Saying that Congress may regulate commerce "among the several states" just doesn't tell us whether mandating the purchase of health insurance is included in Congress's interstate commerce power. Moreover, sometimes we come to understand that the text doesn't mean what it says anyway. The First Amendment states that "Congress shall make no law...abridging the freedom of speech," but all constitutional lawyers agree that this constitutional prohibition applies to the president and the courts as well, even though this isn't specifically stated. Because words never have meaning by themselves, we need a way to interpret them.

The major struggle over theories of constitutional interpretation is between those judges and scholars who believe that the Constitution should be narrowly interpreted only according to the intent of the framers or the understanding of its provisions at the time of adoption and those who assert that we have to look beyond those intentions and understandings. The former theory, that the Constitution has a "changeless nature and meaning," as Justice David Brewer wrote (South Carolina v. United States, 1905) is known as originalism or interpretivism; the latter is known as nonoriginalism and is sometimes described as the idea of a living Constitution.

For originalists, adhering to the original understanding of constitutional provisions is mandated by the structure of the Constitution and keeps judges from running amok. The framers of the Constitution, acting on behalf of the people, delegated powers to the federal government. The power of judicial review is one of those powers. But no part of the government, including the courts, may exceed the scope of the powers that have been delegated to it, so the Supreme Court always must abide by the intent of the framers in making its decisions.

This adherence to the original understanding is more than a legal necessity based on the structure of the Constitution, originalists argue; it is a practical necessity as well. Original intent provides a firm basis for constitutional decisions. As Justice Scalia, the most prominent contemporary originalist, has written, "The originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say
usually—that is easy to discern and simple to apply.” Once the Court goes beyond this basis, it necessarily must resort to something other than the determinate understanding of the framers—something such as a political, economic, or philosophical theory as to what a just result would be in the case. But there are many such theories available—liberal, conservative, and otherwise—and a justice has no basis for choosing among them other than his or her own preferences. This ability to choose raises the specter of activist judging, of the justices superseding the decisions of the Congress or the states simply on the basis of their own personal preferences.

The concept of originalism as a solid source of constitutional law is as attractive as the idea of a text with plain meaning, but nonoriginalist judges and scholars have identified problems with the concept. There is an initial problem of our ability to render a historical judgment about original intent or understanding. Reference to “the intention of the framers” suggests that there existed a definable group of framers and that we can determine their intentions with a high degree of certainty. But who are the framers? The original Constitution was drafted, negotiated, and voted on in a convention composed of delegates from different states with different points of view and then ratified by the members of thirteen state legislatures and conventions. The Bill of Rights was drafted in the First Congress and then submitted to the states for ratification. Subsequent amendments were drafted by later Congresses and ratified by still more state legislatures. Whose intent are we to focus on: the drafters of the provision at issue, others who participated in the debate at the convention or in the Congress, or members of the ratifying legislatures?

The difficulties of ascertaining historical intention have led some originalists to shift focus from the intention of the framers to the general understanding of a constitutional provision at the time of its enactment, what Justice Scalia described as “the intent that a reasonable person would gather from the text of the law.” The search for original understanding therefore presumes that we can comprehend the framers’ world and apply that comprehension to our own world. But nonoriginalists point out the difficulty of achieving that comprehension. Originalism presumes that historical intent is a fact, like a physical artifact waiting to be unearthed. Historians know, however, that an understanding of the past is always shaped by our own views. It is impossible to achieve knowledge of the past unfiltered by our understanding of the present; how can we pretend not to know what we do know about what has happened over the past 200 years? Moreover, any historical understanding we do have must be applied to vastly changed circumstances. When the authors and ratifiers of the First Amendment thought of freedom of speech and freedom of press, they could only have in mind some idea of freedom of speech and press—literally—because speaking and publishing were the only forms of communication available. How do we translate that understanding to the regulation of, for example, readily accessible pornography on the Internet or pervasive commercial advertising on television?

In dealing with social changes of this magnitude, the Court cannot simply ascertain and apply an original understanding that could not actually have been held. Instead, perhaps the Court should look more broadly for the original principles motivating a particular constitutional term, a set of provisions, or the Constitution as a whole. The problem with a strict originalism may be that it looks too narrowly for the intention behind a provision. Some originalists and nonoriginalists suggest instead that it is possible to construe the Court’s interpretation of the Constitution through the development of principles that arise from the text.

Consider the due process clauses of the Fifth and Fourteenth Amendments, which state that no person may be denied life, liberty, or property without due process of law. Assume that we can tell that at the time of enactment people held some specific ideas about the meaning of the clauses. Here we can even refer to the rest of the Bill of Rights to suggest the content. Liberty includes physical liberty, and the government may not take someone’s liberty away without a trial by jury in which the defendant is allowed to be represented by counsel, to confront witnesses, and so forth. But the due process clauses would be superfluous if all they did was to restate the protections of the Fourth, Fifth, and Sixth Amendments. The clauses may state a more general principle about the right of Americans to be protected from government interference. “Liberty” in this more general understanding means the right to be left alone to carry on one’s daily life and personal affairs, and that liberty interest may only be invaded by the government when it has an important basis for doing so. Thus in determining and applying the meaning of the due process clause, the Supreme Court can refer both to the narrower meaning—the right to a jury trial—and the broader meaning—the right to be free from government interference. The broader meaning may be particularly useful as the Court faces cases that the framers would not have considered because the technology or social conditions that present them had not yet been developed.

Two problems inher in this approach, however. First, principles such as the right to be left alone may have even a weaker historical pedigree than attempts to establish a narrower original intent. All the problems of reconstructing a historical intention are magnified when the Court tries
to establish a general understanding of a constitutional provision. It is as if the Court were to ask the framers not just “What did you understand the due process clause to mean?” but also to engage them in dialogue about “What broader conceptions, including those you may never have made explicit, lay behind your thinking?” This inquiry is unmoored from historical intention and sets the Court loose to try to attach its own meaning to the constitutional provision without being bounded by original understanding.

Once the Court begins down this path, the second problem becomes apparent. For any constitutional provision, it is possible to state principles at different levels of generality as inhering in the provision. The decision in a particular case will depend on the level of generality at which the Court states the controlling principle. The difficulty is that every principle, whether broad or narrow, is developed by the Court based on its own view of what constitutes a sensible reading of the provision at issue. The Court’s view is informed by the text, its history, its subsequent interpretation, and contemporary political and social realities. The risk, of course, is the problem with which constitutional interpretation began; in formulating its view, nothing checks the Court except its own good judgment and, ultimately, political realities.

In the end, the choice between originalism and nonoriginalism and among their many variations is a choice based on political theory: What is the nature of the Constitution, why does it command obedience, and what is the role of the Court in interpreting it? These are difficult questions to resolve, and history does not answer them for us. Indeed, constitutional historians argue that the framers themselves were not originalists. Lawyers and statesmen in the late eighteenth century did not hold a conception of fundamental law as the positive enactment of a legislative body, such as a constitutional convention, whose understanding in enacting the law should guide its interpretation. And as Justice Kennedy wrote, the authors of the Constitution and its amendments may have intended it to be subject to change:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

(Lawrence v. Texas, 2003)

Does this leave constitutional interpretation at the point where we simply say that it’s all up to the justices’ points of view and that they can read into the Constitution their own political views and personal preferences? Yes and no. “Yes,” in the sense that no plain meaning of the text, historical evidence, or objective principles determine their decisions. Constitutional interpretation inevitably involves an act of choice by a Supreme Court justice among many alternatives, and, as with choices elsewhere in life, the judge will choose based on his or her sense of what the right answer is. And “no,” in the sense that a justice is not completely free to reach any decision on any basis he or she wants. Justices are constrained by the ways the constitutional text has been understood historically and by the political and legal culture.

This brings us back to the idea that constitutional law is as much a language and a process as a body of rules and rights. The words of the Constitution and the ways it has been understood, interpreted, and argued about inside and outside the courts provide the language the justices must use in interpreting and applying the Constitution. Constitutional law provides a way of framing issues and expressing arguments. It is possible to say many different things and remain within the constitutional tradition, but, as with natural languages, some things cannot be said because the words are unavailable or because they seem improper or inappropriate. The Court in the Dred Scott case in 1857 could use constitutional terms and constitutional history to declare that blacks were a “subordinate and inferior class of beings” who could not be citizens of the United States, but a court today could not do the same thing. A court today could, however, rule in favor of or against affirmative action because either result would be within the scope of accepted constitutional discourse; even if we would not agree with the decision or would find it “wrong,” we would recognize it to be at least arguable in a way that a modern-day Dred Scott decision would not be.

When it is taken seriously and pursued in good faith, constitutional interpretation becomes a model of principled debate on important social issues. It can be conducted at one level removed from immediate political controversies, making it easier to consider consequences, construct principles, and analogize to other situations—the kinds of things the legal process is best at. In addition to persuading others, constitutional analysis can be a way of examining one’s own assumptions and beliefs. Too often, of course, constitutional debate is not carried on at this level. Instead, it becomes one more vehicle for the expression of preconceived beliefs. Because the Constitution is subject to varying interpretations,
justices and others can select the interpretation that best fits the conclusion they wish to reach without engaging in a serious process of interpretation.

**Where Does the Supreme Court Get the Authority to Interpret the Constitution?**

The issue of how the Supreme Court interprets the Constitution is vitally important because of the Court’s power of judicial review. In most cases, the Court has the final say on what the Constitution means and how it applies in a particular case. (Every court, federal and state, has the responsibility and the authority to render decisions on constitutional issues, but all of those other decisions can ultimately be reviewed by the U.S. Supreme Court.) We have become so used to judicial review that it seems a natural, inevitable, and even necessary part of our government structure. But note how sweeping the power is. The president, Congress, state legislatures, governors, state courts, state and federal administrative agencies, public officials, and all ordinary citizens are subject to the commands of the nine justices on questions of constitutional law. At the time of the drafting of the Constitution, a power this broad was unknown anywhere else, and even today it is unusual among judicial systems around the world.

Remarkably, the power of judicial review is not given to the Supreme Court in the Constitution itself. Article III states that “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and it extends that power to “all Cases, in Law and Equity, arising under this Constitution” and to other categories. These provisions are organizational and jurisdictional. They create the Supreme Court, but “supreme” means only “highest,” designating a place in the hierarchy but not the Court’s authority. The power to hear cases arising under the Constitution is likewise a grant of jurisdiction to hear certain kinds of cases but not a grant of authority to exercise constitutional review in hearing them. Article VI states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land.” This provision does not tell us either that the Constitution takes precedence over other “laws of the United States”—in other words, that the Constitution is superior to acts of Congress—nor that the Supreme Court, rather than the Congress, the president, or the states, has the authority to conclusively determine what the Constitution means.

The power of judicial review was established by the Court’s decision in the 1803 case of Marbury v. Madison. Constitutional scholars, by consensus, regard Marbury as the most important case the Court ever has decided, and its story bears retelling. As with so many important legal events in our own time, the story involves important personalities, partisan politics, and a little intrigue to go along with the law.

Toward the end of George Washington’s presidency, national politics came to be dominated by two groups: the Federalist Party, which elected John Adams president and controlled the Congress from 1796 until 1800, and the Democratic Republican Party (predecessor of today’s Democratic Party), which would gain a majority in the Congress and elect Thomas Jefferson in 1800. When it became apparent to the Federalists that they would lose control of the executive and legislative branches, they moved to consolidate their power in the judiciary. President Adams nominated his secretary of state, John Marshall, to be chief justice. The Federalist Congress also passed legislation to increase the number of lower federal judges, reduce the number of members of the Supreme Court (to prevent the incoming Republicans from filling a vacancy), and authorize forty-two new justices of the peace in the District of Columbia.

In the last days of his administration, President Adams nominated faithful party members to the new positions, and the Senate confirmed them. On the night before Jefferson was to become president, John Marshall—still serving as secretary of state for the last month of Adams’s term—performed the secretary’s traditional duty of affixing the Seal of the United States to the commissions of the new judges. Through inadvertence, a few commissions were not delivered to the new officeholders that night, and the next day the newly inaugurated President Jefferson directed his secretary of state, James Madison, to withhold the remaining commissions, including one belonging to the soon-to-be-famous William Marbury, who had been appointed as a justice of the peace.

Marbury sued for his commission, bringing what was known as a writ of mandamus in the Supreme Court. (A writ of mandamus is an order from a court to a government official directing the official to perform some duty of his or her office.) Although he brought his action in 1801, the new Republican Congress had abolished the 1801 and 1802 terms of the Supreme Court, and therefore the case was not decided until 1803. Finally, the Court decided the case in an opinion by Chief Justice Marshall who, consistent with the ethical sensibilities of the time, saw no conflict between his roles as participant in the drama and judge of its resolution.

In deciding Marbury, Marshall and his Court faced a dilemma. If Marshall failed to rule that Marbury was entitled to his commission, he would be acquiescing in an assumption of power by the executive
branch, contrary to his Federalist principles and his belief in the need to assert the power of the judiciary. But the authority of the Supreme Court was not yet well established, so if he ordered that the commission be delivered, Jefferson and Madison might simply refuse to comply, provoking a constitutional crisis. Marshall’s ingenious response was to sidestep the controversy by claiming the power of judicial review for the Court but exercising it in a way that denied Marbury his commission.

Marshall’s opinion for the Court first held that Marbury’s appointment was complete when his commission was signed by the president. At that point the secretary of state’s duties in sealing and delivering the commission were ministerial details, and failing to carry them out did not affect Marbury’s status. Next, because Marbury had a right to his commission, the appropriate remedy under law was mandamus directed to the secretary. The catch arose at the third step. Was the Supreme Court the proper forum in which to seek this remedy?

Article III granted the Supreme Court original jurisdiction (i.e., the authority to hear cases in the first instance) in cases in which a foreign diplomat or a state was a party; in all other cases, it had only the authority to hear appeals from lower courts. The Judiciary Act of 1789 had expanded the Court’s original jurisdiction to include the power to issue writs of mandamus against federal officials. Marbury asserted that the Court had jurisdiction of his suit against Madison under the Judiciary Act. In the opinion’s tour de force, Chief Justice Marshall ruled that the Judiciary Act had impermissibly extended the Court’s original jurisdiction beyond that granted by Article III and therefore the Court could not grant relief to Marbury because it did not have jurisdiction of the case. This satisfied the immediate concerns of the Republicans, but the great significance of the case lay in the Court’s assumption to itself of the final authority to determine if the Judiciary Act or any other act of Congress was constitutional. Thus the opinion ceded the immediate issue while profoundly enhancing the Court’s authority.

For Marshall, whether the Court had the power to review the constitutionality of legislation was an easy question. The people created the Constitution to be fundamental, supreme, and permanent law. Part of the constitutional scheme is that the federal government is a government of limited powers. The branches may exercise only the authority that the people have delegated to them in the Constitution. Therefore, any act that is contrary to the Constitution or beyond the powers enumerated in it is void. Article III’s grant of limited jurisdiction was exclusive, so Congress had no constitutional authority to expand the Court’s jurisdiction to include mandamus actions.

So far, so good. The key comes at the next stage of the argument. The Constitution is fundamental law, so it is law, and the interpretation and application of law is the traditional domain of the courts.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the cases. This is of the very essence of judicial duty.

Thus Marshall neatly concludes the syllogism. The Constitution is law. Courts interpret law. Therefore courts interpret the Constitution. But what was obvious to Marshall was not obvious to others. The law that the courts traditionally interpret and the law embodied in the Constitution may be two entirely different things. If the Constitution is fundamental law, perhaps it should not be treated the same as ordinary statutes and cases. Precisely because it is fundamental, constitutional interpretation might just as easily be left to the other branches of government. Congress can make a judgment about the constitutionality of a statute when it enacts one, as with the Judiciary Act, and it would not be obviously inconsistent with the constitutional scheme for the courts to consider that judgment to be definitive.

Despite the lack of logical rigor in Marbury v. Madison, it was the first strong pronouncement of the principle of judicial review. Although the Court exercised sparingly its power to declare congressional enactments unconstitutional in the decades after Marbury—it didn’t invalidate another federal statute until the Dred Scott case in 1857—the power had been asserted and initially acquiesced to by the other branches. Or perhaps it was because the power was exercised sparingly that it took root, since the Court was frequently under attack in the early years of the nineteenth century.

The Court consolidated its power of judicial review by asserting a similar authority over state law. In 1810 the Court first invalidated a state statute in Fletcher v. Peck on the grounds that the statute, an attempt to rescind title to land that had been fraudulently conveyed, violated the contract clause. Then in Martin v. Hunter’s Lessee in 1816, another case involving a land dispute, the highest court in Virginia ruled
for one party but the U.S. Supreme Court, on appeal, ruled differently. The Virginia court refused to obey the Supreme Court's mandate, asserting that it could decide the issue for itself and that the federal Judiciary Act, which granted appellate jurisdiction to the Court, was unconstitutional. When the case returned to the Supreme Court, the Court, in an opinion by Justice Joseph Story, reasserted its constitutional authority. In adopting the Constitution the states had ceded some of their sovereignty to the federal government. The federal judicial power included all cases involving constitutional interpretation, and the supremacy clause made the federal law preeminent. Finally, in *Cohens v. Virginia* (1821) the Court extended its power to encompass the review of state criminal proceedings. Unless state proceedings were subject to review in the federal courts, the states could thwart federal law and policy by punishing individuals who asserted valid constitutional rights.

Thus by the end of John Marshall's tenure as chief justice in 1834, the foundation had been laid for Supreme Court review of the constitutionality of the acts of state and federal legislative bodies and executive officials. Since then it has been recognized that the Court's power to interpret the Constitution is immense. That power is, however, neither unique nor unlimited. Every major public official takes an oath of office pledging to uphold the Constitution and therefore is required to interpret it in the performance of his or her duties. A senator weighs the constitutionality of a bill in deciding whether to vote for it; the president decides whether ordering the torture of enemy combatants is within his constitutional authority as commander-in-chief, and even a police officer on the beat decides whether frisking a suspect is constitutional. To that extent, the real question is not who interprets the Constitution but whose interpretation counts the most.

Throughout American history, presidents and other officials have asserted their independent authority to determine what the Constitution requires and to act on those determinations. Thomas Jefferson regarded the idea of "judges as the ultimate arbiters of all constitutional questions" to be "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy"; because he considered the Sedition Act of 1798 to be unconstitutional, he exercised one of the powers granted to the president by the Constitution and pardoned defendants convicted under it, even though the act had been applied and upheld by the court. Abraham Lincoln famously denounced the *Dred Scott* decision, which held that blacks were not citizens, declaring that it would not bind him as member of Congress or president. George W. Bush issued many signing statements when he signed bills into law that challenged the constitutionality of provisions of the bills and asserted his intention not to enforce them. Today some scholars argue for a revival of *popular constitutionalism*, in which the political branches of government have more of a role in interpreting the Constitution.

When the Court and other branches come into conflict in interpreting the Constitution, however, the Court generally triumphs. Consider two illustrations of attempted and potential resistance and its ultimate futility. The Court's decision desegregating public schools in *Brown v. Board of Education* was met in many southern states by official and unofficial resistance. Some southern legislatures, for example, enacted resolutions "nullifying" the decision and tried to avoid its effects by schemes such as refusing to fund desegregated schools. In *Cooper v. Aaron* (1958), the Court rejected all of these efforts and reasserted the principle of *Marbury*, that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." The southern states' defiance of the Court's power was so challenging to the constitutional order that all nine justices took the extraordinary step of attaching their names to the opinion individually.

In the Watergate era, the courts were faced with a number of cases arising from the investigations into the illegal activities of President Nixon and his cronies. In *United States v. Nixon* (1974), for example, the Court held that the courts, not the president, could determine whether evidence sought by the Watergate special prosecutor was validly subject to the president's claim of executive privilege. Review of evidence like this was a judicial function that Article III had committed to the courts, and the president was subject to their judgment on the issue. More remarkable than the Court's pronouncement was President Nixon's acceptance of it. Even though the chain of events would lead to his resignation in disgrace, the president could not challenge the established practice of judicial review.

Since the Constitution covers the entire scope of government affairs, judicial review could conceivably encompass every aspect of government, and the logic of *Marbury v. Madison* suggests that the Court should engage in constitutional review of any case. Nevertheless, the Court has concluded that as a matter of constitutional requirement or judicial prudence, there are some issues that are committed to Congress or the president without judicial review. The Court is limited in what it can do as a practical matter as a judicial body and as a political matter in assessing its responsibilities relative to the other branches, so it refrains from deciding political questions.
To take an example, there was a spate of litigation during the Vietnam War that sought to declare the war illegal because Congress had never formally declared war, or to prevent the government from prosecuting some parts of the war such as the bombing of Cambodia. Were these nonjusticiable because they involved political questions? Following *Marbury*, one might consider this a straightforward issue of constitutional interpretation. Does the Constitution require Congress to declare war before the president commits troops, or may the president conduct and Congress fund an undeclared war? But would deciding that question engage the Court in policymaking of the kind that is only or best left to the other branches of government? If so, it is a nonjusticiable political question that the courts cannot decide. Although none of the cases reached the Supreme Court, the lower courts held in these cases—and in subsequent cases involving President Reagan’s military engagement in El Salvador and the first Persian Gulf war—that decisions about war and peace were committed to the president and the Congress.

What Powers Does Constitutional Law Give to the Rest of the Federal Government?

The Supreme Court has the power to review state and federal legislation to determine if the laws are constitutional. The federal court system also has jurisdiction over many nonconstitutional cases including ordinary civil cases arising under federal statutes or involving citizens of different states and criminal cases such as bank robbery, drug offenses, and other violations of federal law. What does constitutional law say about the powers of the other branches of the federal government—the legislative branch (the Congress) and the executive branch (headed by the president)?

Recall the basic question with which constitutional law struggles. How do we empower a government to do what we cannot do for ourselves, while making sure that it does not become so strong that it threatens our liberties? The Constitution’s answer grew out of a particular historical situation.

The framers of the Constitution responded to the widespread perception that the government created under the Articles of Confederation was too weak. Under the Articles, Congress had no power to tax, to issue a single national currency, or to control trade. There was neither a strong executive—at that time the president was a member of Congress with limited powers—not a federal court system. Conflict between the states was widespread, with one state imposing tariffs on goods imported from another, and the national government’s inability to repay the huge Revolutionary War debt precipitated a financial crisis. Accordingly, the national government under the Articles was widely perceived to be a failure.

The problem was the inadequacy of the federal government to deal with the situation, so the response was obvious and was adopted by the constitutional convention of 1787: Give greater powers to the national government, powers that would be sufficient for it to control conflicts among the states, order the nation’s financial affairs, raise and pay an army, and conduct foreign relations. But that only answered part of the basic question. The framers also were deeply concerned that the new national government might invade the proper province of state governments or threaten the basic rights of the people. Therefore, the federal government was conceived as a government of expanded but limited authority, having only the powers “enumerated” in the Constitution itself. Implicit in the constitutional structure and made explicit in the Tenth Amendment, the concept of enumerated powers stated that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” And the new government could exercise its powers only through a system we know as checks and balances or separation of powers. A majority could not run roughshod over the interests of the states or the rights of the people because legislation had to come out of a bicameral legislature and be acceded to by the president. To add a final degree of protection against an overly powerful national government, the specific guarantees of the Bill of Rights were drafted by the First Congress and adopted in 1791.

The government lived up to these expectations in the first years under the Constitution. The new government addressed the most pressing issues of the time and the most fundamental requirements of a nation. The First Congress created the essential government departments—State, War, Treasury, the Post Office, the office of Attorney General, and a system of federal courts—and dealt with important economic issues, including imposing taxes, chartering a national bank, taking a census, establishing a monetary system, and creating patent and copyright laws. Up until the Civil War, though, the size of the government was still minuscule.

But look at what has happened to this government of limited, enumerated powers. Ask someone today what “the government” is and they are likely to think first of the national government. The president is often described in the media as “the most powerful person in the world.” Congress legislates on nearly everything, from the protection of endangered species to taxes on imported goods. The federal bureaucracy, four million strong, collects taxes, reviews the merger of large corporations,
assigns licenses to television stations, manages more than half a billion acres of federal lands, and spends three and a half trillion dollars each year. The states, meanwhile, do important things such as operate public schools and maintain the roads, but their activities seem dwarfed by the presence of the federal government.

Every step of the transformation of this government of enumerated powers—from one of tiny scope and limited influence to one that penetrates virtually every aspect of modern life—has been sanctioned through interpretations of the Constitution. The ways in which it did so illustrate how the Constitution is interpreted and applied. The vague constitutional text covers situations unforeseen at the time of its drafting, and the Supreme Court has responded both to the text itself and to changing political, economic, and social values in considering the appropriate scope of government power. The basic elements of the story are, of course, a tremendous expansion of the power of the federal government, relying on broad interpretations of the enumeration of powers in the constitutional text and balancing of the authority of the executive and legislative branches, and the federal government and the states, resulting in more a sharing of powers than a separation of powers.

The fundamental grants of government authority are given to Congress in Article I, section 8, in seventeen specific clauses and one general clause. "Specific" is not the same as "limited," however. The government's powers under section 8 include the powers to "lay and collect taxes," "borrow money," "declare War," and "raise and support Armies"—and, in the residual authority clause 18, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."

Consider as an example of the expansion of federal power and the sharing of power among the branches the ways in which the legislative or executive branches have attempted to exercise power under the commerce clause and how the Supreme Court has responded by weighing the constitutionality of the exercise.

Article I, section 8, clause 3, gives Congress the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." Under the Articles of Confederation the federal government had little power either to regulate interstate or international commerce or to prevent individual states from interfering with it. The commerce clause was designed to correct this situation, enabling the federal government to exercise authority over the national economy internally and externally. The breadth of this power depends on the interpretation of the term "Commerce...among the several States."

This could be read simply to prevent interstate conflicts of the kind that prevailed under the Articles where, for example, one state taxed goods brought in from another. Instead, Congress has used the commerce clause as an authorization to extend federal regulatory power throughout the economy and to place a corresponding limitation on state power. The Supreme Court has usually acquiesced in this assertion of authority, with occasional notable exceptions.

Like so many other constitutional principles, the scope of the commerce clause was first broadly defined in an opinion by Chief Justice John Marshall. In Gibbons v. Ogden (1824), the New York legislature had granted Robert Fulton (the inventor of the steamboat) and a partner the exclusive right to operate steamboats on New York waters, and Fulton had franchised a portion of this monopoly to Ogden. Gibbons began to operate a competing steamboat line between New Jersey and New York under a federal statute, and Ogden sued to enjoin Gibbons from infringing on his franchise. The Supreme Court held that New York's grant of a monopoly conflicted with an act of Congress concerning the licensing of ships, and therefore it was void because of the supremacy clause. Nevertheless, Marshall took the occasion to expound on the power of the national government under the commerce clause.

Marshall identified three elements of Congress's power over interstate commerce and broadly defined each of them. First was commerce. Ogden's counsel argued that "commerce" meant only traffic, or things moving from one state to another, which would exclude navigation. For Marshall, traffic was only a part of commerce: "Commerce, undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches."

The next term to be defined was "among the several states." "Among" did not mean merely "between," according to Marshall. "A thing which is 'among' others is intermingled with them; therefore commerce among the states cannot stop at the external boundary line of each state but may be introduced into the interior." Congress had no power to regulate commerce that occurred wholly within a state, but whether an activity was wholly within a state was measured by its effects, not its physical presence. Even if an activity was carried on entirely within the borders of a single state, if it affected commerce beyond the borders of the state, it was interstate commerce.

The final step was to define "regulate." Marshall determined that "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution itself."
Thus the Court concluded that Congress had constitutional authority to regulate commercial activities that had effects beyond the borders of a single state. But the definition of this authority by the Supreme Court could come only in response to congressional assertion of the authority and challenges to it, and for a half century after *Gibbons v. Ogden*, the Court had little occasion to further consider the definition.

In the following half century—from 1887 to 1937—the Court took a narrower tack even as Congress attempted to exercise the commerce power more vigorously. This was the era of bigness, with the rise of U.S. Steel, Standard Oil, and other new concentrations of wealth and economic power. Congress and state legislatures acted to control the new economic powers, but as the Court became more conservative, it became less willing to acknowledge legislative authority over commerce. In defining the scope of the commerce clause, it abandoned Marshall’s focus on the effects of commerce and adopted a formal, definitional approach. Marshall had decided in *Gibbons v. Ogden* that commerce was more than traffic, but in an 1895 case the Court came close to saying that commerce was only traffic. Congress had enacted the Sherman Antitrust Act to control the new monopolies of major industries. In *United States v. E. C. Knight* the Court limited the Sherman Act by a narrow interpretation of the scope of Congress’s power under the commerce clause. The American Sugar Refining Company had acquired a monopoly of the sugar industry, controlling more than 90 percent of the country’s sugar production. But, the Court said, the federal government could not constitutionally regulate this monopoly because it was a monopoly of manufacturing, not commerce: “Commerce succeeds to manufacture, and is not part of it....The fact that an article is manufactured for export to another State does not itself make it an article of commerce.”

The Supreme Court’s conservative interpretations of the commerce clause reached their most extreme when the Court struck down some key pieces of New Deal legislation designed to bring the country out of the Great Depression. In *Schechter Poultry Corp. v. United States* (1935), for example (the “sick chicken” case), the Court struck down the central element of the plan for economic recovery, the National Industrial Recovery Act. Among other things, the act empowered the president to enforce codes of competition approved by local trade associations. *Schechter Poultry Corp.* concerned the code of competition for the poultry industry in New York City. Poultry undoubtedly was produced in mass quantities, shipped in interstate commerce, and had important national economic effects. The act attempted to regulate the sale of poultry, however, and this was beyond the scope of the commerce clause. In language reminiscent of *E. C. Knight*, the Court defined commerce narrowly: “So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State.”

The Court’s invalidation of the New Deal legislation presented a challenge to the other branches of government, and, after President Franklin Roosevelt’s resounding reelection victory in 1936, he took up the challenge. FDR proposed his famous court-packing plan, under which he would have been authorized to appoint one new justice to the court for each current justice who was seventy years old and had served on the court for ten years. Adoption of the plan would have enabled him to appoint six new justices to create a solid liberal majority that would uphold New Deal legislation.

The debate over the court-packing plan was fierce, and it clearly demonstrated the ambiguities of the Court’s constitutional role. Progressives were outraged by the Court’s ability to thwart the will of an overwhelming popular majority and saw the plan as a means of reining in an undemocratic institution. But the Court had many defenders, even among those who did not agree with its decisions; if there was more to constitutional law than simple politics, the Court had to be immune from this kind of direct political intervention in its decisions.

In the end the court-packing plan failed in Congress but still influenced the Supreme Court. By the middle of 1937 middle-of-the-road Justice Owen Roberts became a more consistent upholder of regulatory legislation, and over the next few years the notoriously conservative “Four Horsemen” (James McReynolds, Willis Van Devanter, Pierce Butler, and George Sutherland) retired, to be replaced by justices appointed by Roosevelt and more sympathetic to his legislative program. The result was a shift in interpretation of the commerce clause to a standard of near-total deference to congressional power, evocative of Marshall’s emphasis on effects, which remained in place until very recently.

In *Wickard v. Filburn* (1942), for example, the Court specifically referred to Marshall’s analysis of the commerce power in *Gibbons v. Ogden*. The secretary of agriculture fined Filburn, a small farmer, $117.11 for growing 239 bushels of wheat over his allotment, even though he intended to use the wheat exclusively on his own farm and not sell it in commerce, interstate or otherwise. Whether the activity was production or manufacturing on the one hand, or marketing and distribution on the other, was irrelevant; the issue for the Court was the effect on commerce, not the character of the activity. The key to determining the scope of Congress’s power under the commerce clause was whether the regulated activity would have an effect on interstate commerce, even if it was not interstate commerce itself. If Filburn
grew and consumed his own wheat, he would not buy wheat on the market. If many small farmers did the same, their cumulative decisions would have a substantial effect on the national market in wheat, so it would affect interstate commerce and therefore was a proper subject for congressional action.

For a half century following the New Deal transformation, the Supreme Court acquiesced in nearly every application of the commerce power by the Congress, including legislation setting minimum wages and maximum hours of work, prohibiting racial discrimination in places of commerce, regulating the sale of food, and criminalizing loan sharking, among many others. In Hodel v. Virginia Surface Mining and Reclamation Association (1981), Justice Rehnquist summarized this history and suggested that “one of the greatest fictions of our federal system is that the Congress exercises only those powers delegated to it” and “the manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction.” Although he concurred in the Court’s decision that a statute regulating intrastate strip mining was constitutional, he warned that “it would be a mistake to conclude that Congress’ power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce.” As new appointments shifted the majority on the Court, Rehnquist’s warning emerged as the basis for a new federalism that limited Congress’s power under the commerce clause for the first time since the New Deal.

In 1990 Congress enacted a statute making it a federal crime to possess a gun within 1,000 feet of a school. Alfonso Lopez was charged under the statute for carrying a handgun into his high school, and he moved to dismiss the indictment on the basis that enactment of the statute was beyond any of the enumerated powers of Congress. The government defended the statute as an exercise of the commerce power; possession of a gun in a school zone may result in violent crime, the costs of violent crime are substantial, and the presence of guns in schools threatens the learning environment, which results in a less productive citizenry, so possession of a gun in a school zone may substantially affect interstate commerce. The Court, in an opinion by Chief Justice Rehnquist, rejected the government’s position, holding that the possession of a gun in a school zone was not economic activity, unlike the growing of wheat in Wickard v. Filburn, and so it was not within the scope of the commerce clause. Particularly in the absence of congressional findings about the burden that carrying guns imposed a special burden on interstate commerce, if this statute was held valid almost any other statute would be constitutional too, including those that invaded subjects traditionally within

the province of the states, such as crime, education, and childrearing (United States v. Lopez, 1995).

The strength of the new federalism became clear in 2013 when the Court considered the constitutionality of the Affordable Care Act (ACA), the signature health insurance reform of the Obama administration (National Federation of Independent Business v. Sebelius, 2012). The most controversial provision of the act was the “individual mandate,” which required individuals either to maintain health insurance coverage or to pay a penalty on their income taxes for failing to do so. In an unusual lineup for the Court, four conservative justices joined Chief Justice John Roberts in holding that the mandate was outside Congress’s commerce clause power, and four liberal justices joined Roberts in holding that the mandate was constitutional under Congress’s power to tax.

The individual mandate was designed to address some of the economic problems of the health insurance market. For example, hospitals sometimes are required to provide treatment whether their patients have insurance or not; to pay for that treatment, the hospitals pass on the costs through higher rates in other cases, and insurers who pay those rates pass on the costs to their customers. Also, the ACA prevented insurers from denying coverage to people with preexisting conditions, which could encourage people to wait until they are sick to buy insurance, again increasing the cost of insurance to everyone. Therefore an individual’s decision to maintain coverage had an effect on the market for health insurance and the cost of the health care system overall, a system that everyone will use at one time or another. Because of this effect, the government argued, the ACA was much like the regulation of wheat growing in Wickard v. Filburn and was constitutional because it regulated activity that had a substantial effect on interstate commerce.

Chief Justice Roberts disagreed. The Constitution grants the federal government the power to “regulate commerce,” but that presupposes that there is commerce to be regulated. The individual mandate does not regulate commercial activity. “It instead compels individuals to become active in purchasing a product, on the ground that their failure to do so effects interstate commerce.” Wickard was different because the farmer was involved in growing wheat—an activity, not an inactivity—which had an effect on the market for wheat. The analogy that often was used in debate about the case, to which Roberts alluded in his opinion, was that Congress can regulate the sale of vegetables but it cannot compel everyone to purchase vegetables because doing so would increase vegetable consumption, which would increase health and decrease obesity, thereby lowering health care costs.
Although the individual mandate was beyond the commerce power, Roberts did uphold it as within the government’s taxing power. The ACA designated the payment uninsured individuals must make as a “penalty,” not a “tax,” but it is to be collected by the IRS through the income tax system. Under the taxing power, the activity/inactivity distinction of the commerce clause was irrelevant, and it resembled other tax incentives, such as the mortgage deduction that encourages the purchase of a home.

Commentators had much to say about Chief Justice Roberts’ opinion beyond its constitutional analysis. The normally conservative Roberts further limited the scope of the commerce clause but used another route to uphold this landmark piece of legislation. Some viewed it as an exercise in overall judicial restraint, drawing fine lines and narrowly construing precedents. Others, reflecting on the controversies about the early New Deal Court, wondered if the opinion was partially motivated by a concern for the Court’s role; the opinion limited the commerce power but avoided striking down a major and politically controversial piece of legislation.

The president’s specific powers under the Constitution include acting as commander-in-chief of the armed forces; appointing ambassadors, judges, and executive officials with the advice and consent of the senate; and recommending and vetoing legislation. Where the Congress possesses only the “legislative Powers herein granted,” however, the Constitution states that “The executive Power shall be vested in a President,” which suggests, and the Supreme Court has held, that the president has all powers normally exercised by a chief executive even if those powers are not specifically enumerated in the Constitution.

The president’s enumerated and general executive powers are great but neither unlimited nor independent of the powers of Congress. Debates about the scope of federal power and of the president’s executive authority are most intense in times of crisis. The extent of the government’s power to defend the nation and the president’s role as commander-in-chief have long been controversial, and the controversy has intensified since the terrorist attacks of September 11, 2001.

The Constitution grants to Congress the powers “to declare war” and to finance and regulate the armed forces, and it designates the president as “Commander in Chief.” Congress and the president therefore can act together, when Congress declares war, which the president then carries out. Congress has declared war only six times in the nation’s history, beginning with the War of 1812 and most recently during World War II; the Civil War and Korean War were among the many undeclared wars. More often Congress fails to formally declare war but in some other way authorizes the president to send troops into combat. Following the September 11 attacks, Congress passed an Authorization for the Use of Military Force resolution that led to the wars in Iraq and Afghanistan.

The president also often takes military action without congressional approval or seeks approval after action is taken; by one account, that has happened more than 130 times, beginning with President Adams’s use of the navy to capture French ships that had attacked American merchant vessels and extending at least through President Clinton’s ordering an air campaign to stop ethnic cleansing in Kosovo. Presidents have justified actions like these by their inherent power to defend the nation against attacks, by the need to protect Americans caught in conflicts abroad, and by obligations to international organizations such as the United Nations and NATO.

How far the president’s power as commander-in-chief extends when he acts without Congressional authorization has been the most controversial issue. One approach was suggested in the Steel Seizure Cases during the Korean War. President Truman ordered the seizure by the federal government of the nation’s steel mills to maintain production in the face of a threatened strike. The Supreme Court held that in the absence of Congressional authorization (indeed, in the face of Congress’s refusal to authorize seizure to settle labor disputes), Truman had no such authority as commander-in-chief or under his general executive power. Concurring in the result, Justice Robert Jackson suggested a flexible, functional test for analyzing presidential power that has been frequently cited. When the president acts pursuant to congressional authorization, his power is greatest; when he acts contrary to the express or implied will of Congress, his power is at its lowest; when he acts on an issue Congress has not addressed, relying on his independent powers as president, he operates in “a zone of twilight,” where the scope of his power depends “on the imperatives of events and contemporary imponderables” (Youngstown Sheet & Tube Co. v. Sawyer, 1952).

Congress also has tried to rein in the president’s power through the War Powers Resolution of 1973, enacted over President Nixon’s veto as a response to the controversy over the Vietnam War. The resolution requires the president to consult with Congress when sending troops into combat situations and to withdraw forces after sixty days unless Congress has approved. Whether the resolution unconstitutionally restricts the president’s power has never been tested, and probably never will be, because it raises political questions the Supreme Court has been reluctant to take up. In the meantime, presidents have sometimes respected the resolution and sometimes not; President Clinton used it when he sent troops to restore Haitian President Jean-Bertrand Aristide.
after a coup in 1994 but failed to do so when he ordered air strikes against Al Qaeda bases in Sudan and Afghanistan in 1998.

The power to make war also can conflict with constitutionally protected civil liberties. During the Civil War, President Lincoln suspended habeas corpus to enable the indefinite detention of those hindering the war. When Supreme Court Justice Roger Taney issued a writ of habeas corpus ordering that a Confederate sympathizer named John Merryman be brought to court or released, Lincoln directed the military officers holding Merryman to ignore the order, claiming the constitutional authority to act when Congress was not in session. Taney did not pursue the matter, and subsequently Congress endorsed the suspension of the writ, as the Constitution permits it to do.

Following the September 11 attacks, Congress authorized the president “to use all necessary and appropriate force” against the persons and groups that planned and supported the attacks. As a consequence, American forces seized combatants and others believed to be tied to Al Qaeda (including American citizens) and detained them both in the United States and at the naval base in Guantanamo Bay, Cuba. The administration of President George W. Bush claimed that the resolution authorizing military force and, perhaps more importantly, the president’s inherent powers as chief executive and commander-in-chief authorized a broad series of actions beyond the control of peacetime law and beyond the review of the courts. His Justice Department issued a legal opinion that stated: “In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy.” Accordingly, he initially claimed the constitutional power to order the torture of prisoners to obtain intelligence even though Congress had prohibited such action in its adoption of the United Nations Convention Against Torture; after extended publicity, the Justice Department withdrew its opinion and the president disavowed that claim. The administration also claimed that prisoners held at Guantanamo Bay and even U.S. citizens designated as “enemy combatants” were beyond the reach of the courts. (After September 11, the government also expanded its use of wiretapping, interception of email, and other electronic surveillance; those measures presented issues under the Fourth Amendment and are discussed in Chapter 9.)

In a pair of cases in 2004, the Supreme Court rejected those claims, asserting that the president’s powers were limited even during the war on terror and that the courts had the authority to determine the scope of those powers. Particularly because of the extent of control of Guantanamo Bay by the United States, the federal courts had jurisdiction “to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing” (Rasul v. Bush, 2004). Yaser Hamdi, an American citizen seized in Afghanistan for having fought with the Taliban, likewise was entitled to receive notice of the basis for classifying him as an enemy combatant and to contest the claims before a neutral decision maker. The president, pursuant to the congressional resolution, could designate a citizen as an enemy combatant and order his detention, but even an enemy combatant could not necessarily be held indefinitely, and not without being given due process (Hamdi v. Rumsfeld, 2004).

In response to Rasul and Hamdi, Congress enacted the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 to prescribe procedures for the review of detainees’ status and to restrict review by the courts of the military’s decisions on detainees, specifically excluding habeas corpus actions. In Boulmedienne v. Bush (2008), the Supreme Court declared that the procedures and restrictions were unconstitutional. The Constitution provides that habeas corpus may be suspended by Congress only “when in Cases of Rebellion or Invasion the public Safety may require it,” and the statutes neither hewed to the requirements of the suspension clause nor provided procedures that were an adequate substitute for habeas corpus. A detainee whose fate was being determined by a military commission could have a “representative” who was neither a lawyer nor even the detainee’s advocate, the evidence presented by the government would be presumed valid, the detainee could have access only to unclassified portions of the evidence, and he could present only limited, “reasonably available” evidence of his own.

What Powers Do the States Have Under Constitutional Law?

The story so far has been the creation of a national government strong enough to correct the weaknesses of the government under the Articles of Confederation, the limitation of the powers of that government by the doctrine of enumerated powers, and the subsequent expansion of its powers through broad interpretation of specific grants of authority such as the commerce clause. But what about the states? The states existed before the national government was created, and state delegates drafted and ratified the Constitution. As the power of the federal government has expanded, how do the states fit into the constitutional scheme?

As with every other issue of constitutional law, the answer to this question is not simple. The text of the Constitution says little about state authority, explicitly granting few powers to state governments and explicitly placing few limits on federal authority vis-à-vis the states. As
times have changed and the federal and state governments have asserted their authority in different ways, the Supreme Court has struggled to define the areas in which each may properly operate.

Even though the Constitution doesn’t say so, federalism— the idea that governmental power is shared by state and national governments—is a basic postulate of our constitutional system. The federal government is a government of enumerated powers, exercising only those powers specifically granted to it in the Constitution— though we have seen that that limitation is often more theoretical than real, given the Supreme Court’s acquiescence in the expansion of federal authority. The states, on the other hand, are assumed to exercise the general police power, or the power to do all of the usual things that governments do. The courts have developed a substantial body of law on the meaning of the enumerated powers of the federal government (such as the commerce power), but there is no comparable body of law on the authority of state governments, because their powers are general rather than enumerated. The Constitution does not specify the general authority of state governments because it doesn’t have to— everyone understood the concepts at the time of the drafting, as we do today from current political situations and the necessary implication of the constitutional structure.

It should be easy to reconcile state and federal powers. The states have general authority, while the national government has limited authority specifically enumerated in the Constitution. The Tenth Amendment makes clear that the authority of the states extends beyond that of the national government: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” But the Constitution also contains a supremacy clause, in Article VI, section 2: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Thus the states have general authority, and the federal government has limited authority, but within its authority the federal government is supreme. So how are the courts to draw the line between federal and state authority?

For a long time, from the post-Civil War years to the beginning of the New Deal, the Supreme Court tended to limit federal authority in favor of state authority. This approach was a corollary of the Court’s conservative approach (discussed earlier), which limited the scope of federal powers under the commerce clause and other provisions. The concept was called dual sovereignty. Both the national and state governments had their proper sphere of authority, and neither could invade the other’s sphere. Frequently the Court would invalidate congressional enactments by finding that the statute in question was beyond the federal government’s enumerated powers or that it invaded the powers of the states. In Hammer v. Dagenhart (1918), for example, the Court held that a federal law prohibiting the shipment in interstate commerce of goods produced with child labor exceeded the commerce power, and in Keller v. United States (1909) it ruled that a federal prohibition on houses of prostitution invaded the states’ police power.

The concept of dual sovereignty and the broad scope for state authority it entailed has faded. The possibility of clearly distinguishing between areas of sovereignty was more congenial to the nineteenth-century mind than to legal thinkers of the twentieth and twenty-first centuries, and, after FDR, the Great Depression, and the New Deal, the Court was more willing to acquiesce in the expansion of federal authority. Today the allocation of authority between the national and state governments is controlled by the doctrine of preemption, including the puzzling effect of dormant federal powers. Where the federal government acts, it preempts state law that actually or potentially conflicts with the federal law. And sometimes where the federal government has not acted but could act— where its power is dormant—state legislation also is barred.

The preemption of state law that is inconsistent with federal law is easy to understand as an operation of the supremacy clause. Where the Federal Arbitration Act says that parties to a contract can agree to submit a dispute to arbitration notwithstanding any contrary provision of state law, a California statute that attempted to invalidate such an agreement is preempted (Southland Corp. v. Keating, 1984). The difficult question is to what extent state and federal laws that are not obviously inconsistent still conflict to such an extent that the state law must fall. Sometimes the Supreme Court will be deferential to the concerns of federalism and interpret the statutes to avoid a conflict; at other times the Court will be more sensitive to national interests, particularly where it perceives a need for national uniformity. In Cipollone v. Liggett Group, Inc. (1992), the Court held that federal law on cigarette labeling preempted state tort liability for failure to warn of the dangers of smoking. But in Altria Group, Inc. v. Good (2008), it concluded that a federal statute did not preempt a state fraud claim against cigarette manufacturers for deceptively advertising that “light” cigarettes were less harmful. In both cases, the Court focused on Congress’s express and implied intent in enacting the law; in Cipollone the state law conflicted with the federally required health warning on cigarettes, but in Altria Group the state law was aimed at deceptive advertising, not the health effects of smoking. Unless
Congress has demonstrated “a clear and manifest purpose” to preempt state law, the state’s police power remains intact.

Federal law can preempt state law even in the absence of an actual conflict where Congress has occupied the field subject to regulation. This is a matter of interpretation of how far Congress originally intended to go. Where the issues are of national interest or require national uniformity—as with the regulation of Indian tribal affairs, immigration, or the migration of birds throughout the country—the Court is likely to read federal statutes as preempting the field.

Perhaps the fuzziest area of preemption doctrine concerns cases within the powers of Congress in areas within which Congress has not yet legislated. Does the dormant power not yet exercised prevent the states from acting in the meantime? Early advocates of a strong national government argued that the ability of states to legislate on matters having effects beyond their borders was a major weakness of the government under the Articles of Confederation, which the commerce clause and supremacy clause were intended to cure. Accordingly, states could not act within areas covered by the federal commerce power, although they might legislate in other areas that would have some incidental effect on commerce. Others took a narrow view of the federal power, arguing that state legislation was preempted only where it actually conflicted with federal enactments.

The resolution of this issue began in the 1850s and was definitively formulated in a series of cases from the New Deal forward. The test is sensitive to concerns of federalism. States ought to be permitted to legislate in response to local needs, but they should not be permitted to interfere with the flow of commerce among the states. The Court balances the state’s local interests in enforcing its legislation against the burden and discrimination imposed by it on interstate commerce. Thus a state may protect its interest in safe highways by enacting maximum height and weight limits for trucks on its roads, even if few trucks can meet the limits, because the ban was imposed equally on trucks used within the state and going through the state (for example, South Carolina State Highway Dept. v. Barmwell Bros., 1938), but it may not ban extra-long tractor-trailers where the terms of the ban exempted many in-state truckers (as in Kassel v. Consolidated Freightways Corp., 1981).

One other aspect of the constitutional allocation of authority between the national government and the states deserves mention. The states have independent constitutional status and general police power, while the federal government has only enumerated powers, so there are things the federal government cannot direct the states to do. The federal government could not, for example, tell a state where to locate its capital, as it tried to do when Oklahoma was admitted to the Union (Coyle v. Smith, 1911). But as the federal government and the federal budget have grown, Congress has devised a mechanism for getting the states to do what it wants without directly commanding them. Congress establishes federal spending programs administered through the states but conditions a state’s participation on its compliance with specified conditions. For example, the Twenty-first Amendment ended prohibition and gave the states near-total authority over the sale of alcoholic beverages. Because of the states’ authority, arguably the amendment bars Congress from enacting a national minimum drinking age. In 1988, however, Congress enacted a statute that withheld a portion of federal highway funds from a state unless the state had a minimum drinking age of twenty-one. As a practical matter, this was equivalent to a national requirement because every state depended on federal funds to build and maintain its roads. Could Congress do indirectly what it could not constitutionally do directly? Yes, Chief Justice William Rehnquist said for a majority of the Court, because controlling highway funds was within the Congress’s spending power and the drinking age was related to safe travel on interstate highways.

As with Congress’s commerce clause power, NFIB v. Sebelius (2013) drew limits on this use of congressional action in relation to the states—the first time the Court had held a Congressional spending condition unconstitutional. The ACA extended the Medicaid system for providing health care to low-income Americans by requiring states to cover residents within 133 percent of the poverty line; the federal government would pay 100 percent of these costs until 2016 and would decrease its payments to 90 percent thereafter. Chief Justice Roberts’ opinion concluded that this measure crossed the line from encouraging the states to participate in Medicaid to coercing them to do so. He characterized the threat of cutting off all Medicaid funds for failing to comply with the new program as “a gun to the head” of the states, because Medicaid was so well entrenched and constituted such a large portion of the budget of the states that they could not bear to lose the funds.